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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. The government has previously conceded that the decision in *United States* v. *Fox,* 454 F.2d 593 (9th Cir. 1971), is "inconsistent with the earlier decision in this case [*Davis*]", Mem. Opp., p. 2, and it persists in its position that *Fox,* the latest decision of the Ninth Circuit, is incorrect, and that the conflicting decisions in this case are correct. Mem. Opp., p. 4.[1] It has now also conceded that whether or not the new rule announced in *Fox* is the type of "new law" contemplated by the dissent in *Thornton* v. *United States,* 368 F.2d 822 (D.C. Cir. 1966), adopted

[1] This case presents the anomalous situation of an apparently irreconcilable division within the Ninth Circuit, where the Solicitor General disagrees with *Fox,* the most recent decision, yet vigorously opposes *certiorari,* the only feasible path by which it can be determined if the Ninth Circuit's latest decision is correct, or if the Ninth Circuit's earlier decision, which the Solicitor General favors, is correct.

in *Kaufman* v. *United States*, 394 U.S. 217, 230-231 (1969), "is unclear." Mem. Opp., p. 5, n. 3.[2] These concededly open questions can only be settled by this Court.

Indeed the Ninth Circuit itself seems to have answered the question in petitioner's favor by its decision in *Zack* v. *Benson*, 454 F.2d 596 (9th Cir. 1971), a companion case to *Fox*, granting the petitioner there the identical relief sought by the petitioner here on similar facts, and specifically decided "on the authority of" *Fox*. *Ibid.* The decision in *Zack* (which surprisingly is nowhere dealt with in the Solicitor General's Memorandum) is the answer to the government's qualms regarding "retroactivity."[3]

2. The attempted distinction drawn by the government between "constitutional" and "statutory and regulatory" arguments, Mem. Opp., p. 5, seeking collateral relief is spurious. Petitioner's claim is constitutional, since the operation of the statutorily unauthorized delinquency regulations violated his Fifth Amendment rights to due process. As Chief Judge Zavatt has written:

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[2] The Government may be as unhappy with *Kaufman* as it is with *Fox*. But the vitality of *Kaufman* has been reaffirmed as recently as last term, *Schneckloth* v. *Bustamonte*, —— U.S. ——, 36 L.Ed.2d 854, 875, n. 38, and even the Justices of this Court who would be prepared to reconsider *Kaufman*, limit their concern to collateral attacks based solely on Fourth Amendment claims unaccompanied by any showing of innocence. See Concurring Opinion of Mr. Justice Powell, 36 L.Ed.2d at 879-881. In this case, in sharp contrast, if the delinquency-based induction order was invalid, then petitioner has committed no substantive crime.

[3] Whether the decision in *Zack* v. *Benson* is to be regarded as holding that *Fox* is retroactive, or that *Fox* is not purely prospective, is a question that need not be reached since petitioner is procedurally and substantively entitled to the same relief as Zack.

"The purpose of the decisions in *Breen* [v. Selective Service, 396 U.S. 460 (1970)] *supra* and *Gutknecht* [v. United States, 396 U.S. 295 (1970)] *supra*, read together was to invalidate local board action punishing registrants pursuant to delinquency regulations. The Court held that local boards have no Congressional authorization for such action. The stated purpose is not one which affects a particular procedure in the process of delinquency . . . but, rather, one which invalidates the delinquency procedure in its entirety. Since a local board has no power to punish a registrant by . . . accelerating his induction, it follows a fortiori, that a failure or refusal to obey a local board's induction order, under such circumstances, cannot constitute the basis of a criminal indictment and subsequent conviction thereunder.

"The purpose of the *Breen* and *Gutknecht* decisions, viewed broadly, is immaterial to the fact finding procedures leading to a conviction. The concern is not with the facts upon which a conviction is based but, rather, the principle that the trial should never have taken place."

United States v. *Kelly*, 314 F. Supp. 500, 509 (E.D.N.Y. 1970). See *Bucher* v. *Selective Service System, Local Boards No. 2 Etc.*, 421 F.2d 24, 27-28 (3d Cir. 1970).

As reiterated by this Court in *Breen* and *Gutknecht*, and elucidated by Judge Zavatt, this disconcern with "a particular procedure in the process of delinquency" is exactly why the June 1970 amendments to 32 C.F.R. §1631.7(a) is not a basis upon which to deny certiorari here. At least one court has held even these amendments invalid under

Breen and *Gutknecht*. See *United States* v. *Castillo, et al.*, —— F. Supp. ——, 72 Cr. 153 (D.P.R. March 23, 1973) (Cancio, Ch. J.).[4]

3. The government takes umbrage at petitioner's decision not to attempt for a second[5] time to secure *en banc* review of petitioner's case in the Ninth Circuit. Mem. Opp., pp. 3-4, n. 1. Thus, the Solicitor General speculates that, "there is no reason to assume the court would not have reheard *this* case *en banc* had petitioner sought such a rehearing." *Ibid.* Having been once denied such a rehearing, see n. 5, *supra,* there is no more reason to believe that the court below *would* have heard petitioner's case *en banc*. This Court, in any event, has never suggested that certiorari should not be granted because an *en banc* determination was not *twice* sought in the Court of Appeals. It would be particularly inappropriate to do so in a case involving the denial of relief under the federal habeas corpus statute.[6] See *Harris* v. *Nelson*, 394 U.S. 286, 292 (1969).[7]

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[4] A copy of the *Castillo* opinion is annexed as an appendix to this reply brief. This Court's attention is respectfully invited to pp. 5-7 thereof, wherein Chief Judge Cancio analyzes the Ninth Circuit's decisions in *Fox* and other cases. This analysis is in accord with petitioner's discussion of the significance of these opinions in his first petition for certiorari, No. 71-661, Oct. Term, 1971, at p. 11, n. 8.

[5] What is characterized by the government as a "Motion for Extension of Time in Which to File a Petition for Rehearing," Mem. Opp., pp. 2-3, was in fact a full-fledged petition for rehearing *en banc* accompanied by a lengthy brief in accordance with Rule 35, F. R. App. P. Under applicable Ninth Circuit law, the motion and petition could have been considered. See *Munoz and Tigar* v. *United States District Court for the Central District of California*, 446 F.2d 434, 436 (9th Cir. 1971).

[6] While *en banc* resolution may in some circumstances be a factor affecting the exercise of certiorari jurisdiction, see cases discussed at pp. 9 and 14, notes 5 and 10 respectively of the Petition, it is not in others. See *Switzerland Cheese Assn.* v. *Horne's*

4. The continuing importance of the issue here sought to be reviewed cannot be underestimated. The government's characterization of the effect of any ruling in this case is as strongly supportive of a decision in favor of a grant of certiorari as one denying it:

"It is impossible to speculate how many untried indictments there may be involving fact situations similar to the one in this case. . . ." Mem. Opp., p. 4.[3]

Market, 385 U.S. 23, 24 n. 2, where after the grant of certiorari, which had been motivated by conflicting decisions of the First and Second Circuits, the Second Circuit, *en banc*, reversed its position and thus terminated the conflict. This Court, however, merely noted this fact and proceeded to resolve the case on its merits, reaching a result in accord with the Second Circuit *en banc* determination. See also *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1021-1026 (2d Cir. 1973) (petition for rehearing *en banc* denied); petition for certiorari pending, No. 73-203, Oct. Term, 1973, filed 7/30/73, 42 USLW 3075.

[1] The doctrine of *res judicata* is inconsistent with the purpose and history of habeas corpus. See *Gosa* v. *Mayden*, —— U.S. ——, 37 L.Ed.2d 873, 895, 905-906 (1973) (Dissenting Opinion, Marshall, J.).

[3] Indeed if one wished to speculate, it is not improbable that a large portion of the thousands of young men who are in Canada and other foreign countries in fugitive status on pending indictments in Selective Service cases, departed from the United States after being ordered to report for physical examinations, and were subsequently declared delinquent and ordered to report for induction because of such failure. A grant of certiorari would settle the question of whether *Fox* is the law, or whether the contrary view of the Solicitor General is the law, and help to resolve the dilemmas facing these young men, and members of the Bar who are increasingly being called on to advise them of the legal consequences of their returning to the United States. Moreover, despite the lapse in induction authority prosecutions continue to burgeon. Only recently hundreds of men were indicted *en masse* in Buffalo and Rochester, New York, for alleged violations stemming from time periods both previous to and subsequent to this Court's decision in *Breen* and *Gutknecht*. See Memorandum for the United States in *Musser* v. *United States* and *Waldron* v. *United States*, Nos. 72-1733 and 72-6748, Oct. Term 1973, p. 6 n. 8, estimating a total of 10,500 registrants either under or awaiting indictment. See also Courier Express, 6/19/73 (Buffalo, New York), p. 1.

CONCLUSION

For all of the foregoing reasons certiorari should be granted and the decision below reversed.

Respectfully submitted,

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September 1973.

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* Attorneys for petitioner gratefully acknowledge the assistance of Mr. Edwin J. Oppenheimer, Legal Assistant, New York Civil Liberties Union.

Memorandum Opinion and Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

Cr. 153-72
154-72
194-72
195-72

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTONIO HERRERA CASTILLO, RAFAEL RODRIGUEZ ZALDO, FRANCISCO RAMOS BONILLA, LUIS MEDINA MERCADO,

Defendants.

These cases are presently consolidated for the purpose of deciding the common issue of law related to the defendants' motions to dismiss those counts which involve failure to report for induction into the armed forces of the United States. All the defendants herein are charged with failure to report for induction and for failure to report for physical examination. The Government concedes that the defendants were never submitted to physical examination pursuant to the Selective Service Act. The defendants contend that their being called to report for induction without their being physically and mentally declared fit for induction, constitutes a violation of the Selective Service Act.

The defendants concede that they may be indicted for failure to report and submit to a physical examination, but maintain that a successful completion of such an examination is a prerequisite to being called for induction.

The Government relies on the following Selective Service Regulation:

> "Section 1631.6 Action by local board upon receipt of allocation:
>
> . . . .
>
> Provided, That notwithstanding Part 1628 or any other provision of these regulations, when a registrant in whatever classification has refused or otherwise failed to comply with an order of his local board to report for and submit to an Armed Forces examination, he may after he is reclassified into Class 1-A or 1-A-O be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him and in such case the Armed Forces examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined." (32 CFR 1631.6).

Local Board Memorandum No. 106[1] is also relied on. It reads, in part, as follows:

> "Every Class 1-A or 1-A-O registrant who refuses or otherwise fails to report for and submit to an armed forces physical examination as ordered, shall be or-

[1] Issued on June 16, 1970 pursuant to an Executive Order of the same date.

dered to report for induction, provided he has not be ordered for induction until his or a higher random sequence number is reached for induction by his local board.

A registrant who has already failed to report for physical examination, and against whom no prosecution is pending for such failure, should be re-ordered for physical examination. If he again fails to comply he may be processed for induction under the provisions of amended 1631.7 of the regulations."

In *Gutknecht* v. *United States*, 396 US 295 (1969) a Selective Service registrant was declared "delinquent" pursuant to the then existing regulations for surrendering his registration certificate and classification notice, and ordered to report for induction. The Supreme Court ruled that the delinquency regulations under which petitioner was deprived of the order of call preference, to which he was entitled, were not authorized by the Selective Service Act.

The Government would have us limit the effects of that decision merely to cases in which the order of call is alter alleging that since the defendants were subject to the present lottery system, no violation of the *Gutknecht* doctrine is involved in this case. We feel that counsel reads *Gutknecht* rather restrictively.

That decision stands for the general proposition that Congress intended to punish registrants who failed to comply with their duties under the Act through the criminal sanctions contemplated in that law and not through using immediate induction as a disciplinary or inductive measure. This prohibition against special treatment of

"delinquents" is broad indeed and we feel covers the situation at bar. The Court stated at p. 306 as follows:

> "While Section 5(a)(1) provides that 'there shall be no discrimination against any person on account of race or color' (citations omitted) . . . there is no suggestion that as respects other types of discrimination the Selective Service has freewheeling authority to ride herd on the registrants using immediate induction as a disciplinary or vindictive measure."

The Court very clearly stated that the only punitive measures which the Board could take against a registrant were those criminal sanctions expressly contemplated in the Act. (See also: Breen v. Selective Service Board, 396 US 460 (1969) at p. 465-466.) The Court stated:

> "We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized. Nor do we read it as granting personal privileges that may be forfeited for transgressions that affront the local board. If federal or state laws are violated by registrants, they can be prosecuted. If induction is to be substituted for these prosecutions, a vast rewriting of the Act is needed."

A registrant who fails to submit to a physical examination may be prosecuted under Section 462, 52 USC, for failure to report and submit to such an examination. The defendants here are charged with such an offense. The law, as we read it, authorizes no other sanctions, and much less an immediate order for induction.

The treatment accorded to the defendants in these cases differs from the treatment normally accorded other registrants before they are called for induction, namely, compliance with the applicable regulations. Section 1631.6, 21 CFR, clearly requires that a registrant first be found acceptable for service and that he be sent prior to being ordered to report for induction a statement of acceptability (DD Form 62).[2] The doing away with these two prerequisites in cases of registrants who have failed to report for a physical examination establishes acceleration of call as a matter of law.

The prior regulation involved in *Gutknecht* was voided in *United States* v. *Fox*, 454 F2d 593 (9 Cir., 1971), when applied to a situation identical to the case before us. In *Fox* the registrant was declared "delinquent" for failing to report for his physical examination and ordered to report for induction. While the present section 1631.6 does not declare the registrant a "delinquent", the effect is identical to what the Ninth Circuit Court of Appeals declared impermissible in *Fox*. The Court in that case, when faced with an attempt by the Government to prove that the registrant was not accelerated, decided that he was as a matter of law. The Court stated that without the declaration of delinquency the registrant could not have been ordered to report for induction since the Board

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[2] 1631.6 Action by local board upon receipt of allocation.

(a) When an allocation is received from the State Director of Selective Service, the Executive Secretary or clerk, if so authorized, or a local board member, shall select as provided herein, and issue orders to report for induction to those men required to fill the call from among its registrants who have been classified in Class 1-A or Class 1-A-O and have been found acceptable for service in the Armed Forces and to whom a Statement of Acceptability (DD Form 62) has been mailed.

had not complied with the other prerequisites for induction which were that the registrant be classified 1-A or 1-A-O, be found acceptable for service in the Armed Forces, and have been mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction. These are the same prerequisites mentioned in the existing regulations in the present case. What the government could not do by naming the registrant a "delinquent" in *Fox* it cannot do here merely by failing to call him so. After all, "a rose is a rose, is a rose" no matter what you call it.

An identical result as that stated in *Fox, supra,* was also reached in *United States* v. *McClintock,* 311 F. Supp. 1119 (ND Cal., 1970); *United States* v. *Townsend,* 431 F2d 702 (9 Cir., 1970) and in *United States* v. *Stow,* 427 F2d 891 (9 Cir., 1970).

The importance of a prior determination of acceptability is plainly recognized by the law:

> "Section 454(a) . . . .
>
> No person shall be inducted into the Armed Forces for training and service . . . until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense." (50 USC 454(a).)

The applicable regulations (32 CFR 1631.6) attempt to cure the lack of a prior determination of acceptability when a registrant fails to report for a physical examination, and because of this is ordered to report for induction, by requiring that on reporting for induction such

registrant submit to the physical examination required by law.' This implicitly recognizes that the registrant has been ordered to report for induction without compliance with the acceptability prerequisite. The regulation clearly establishes that this is done when a registrant fails to report or submit to a physical examination. Ordering the registrant to report for induction without a prior determination of acceptability in this situation falls within the prohibition of *Gutknecht*, constituting an acceleration as a matter of law and a punitive measure because of his failure to report for a physical examination.

While we feel that the defendants' actions in refusing to report for their physical examinations is remonstrable, they can only be liable for the criminal sanctions the law provides and not for an accelerated order to report for induction. The Court in *Fox*[4] faced the same dilemma:

> "We realize that the result does not seem to be a desirable one; Fox was about as delinquent as it would be possible for a young man to be in relation to his various duties under the Selective Service Law. But we did not write the law or the regulations, and the defect in them that produces the result in this case has been corrected. As the Court pointed out in *Gutknecht*, there was a remedy: Fox could have been prosecuted for one or more of his numerous delinquencies. But that was not done; instead, the delinquency route to accelerated induction, condemned in *Gutknecht*, was taken."

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[3] ". . . and in such case the armed forces examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined." (32 CFR 1631.6(a)).

[4] *Supra*, at pp. 595-596.

Contrary to *Fox*, where the defendant was indicted only for failure to report for induction, the defendants in these cases are also indicted for failure to report for physical examinations, which charges we need not dismiss.

It is therefore ORDERED that Counts One in Criminal cases 153-72, 154-72, 194-72 and 195-72 are hereby dismissed.

It is so ordered.

San Juan, Puerto Rico, March 23, 1973.

HIRAM R. CANCIO
Chief U. S. District Judge

[March 23, 1973]